Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 80-534

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOY ADLER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

PETITIONER'S REPLY BRIEF

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Statute Cited

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PETITIONER'S REPLY BRIEF

POINT I

The petition is not jurisdictionally defective.

Respondent claims that the petition for a writ of *certiorari* in this case is jurisdictionally defective in that the order sought to be reviewed is not a "final" one as contemplated by 28 U.S.C. 1257(3). Respondent contends that

this Court's decision in *Chapman* v. *California,* 405 U.S. 1020, 31 L Ed 2d 483, 92 S.Ct. 1284 mandates the denial of *certiorari* in the case at bar.

We respectfully submit that there are several reasons why (1) the position taken by respondent is incorrect and (2) the petition should be heard on the merits at this time.

First, by its language, 28 U.S.C. 1257(3) does not preclude review of the petition for *certiorari* in cases involving appeals from pre-trial orders on motions to suppress.

Second, the petition herein meets each of the criteria set forth in this Court's decision in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 95 S.Ct. 1029, 43 L Ed 2d 328 (1975) with regard to accepting jurisdiction in state court matters of this type.

Third, the *Chapman* decision is inapplicable here in that (1) *Chapman* involves the application and consideration of appellate procedures followed in California and not New York, and (2) *Chapman* pre-dates this Court's decision in *Cox Broadcasting Corp.* which is the latest discussion by this Court concerning the standard to be applied to petitions for *certiorari* from interlocutory state court determinations.

Fourth, the established procedural law in New York, which respondent has totally ignored, regarding the "finality" of orders of the New York State Court of Appeals shows that the order sought to be reviewed, which here involves the federal issue in question, is final for all purposes in New York and cannot be the subject of further review (*Kissling* v. *Hearn,* 264 App.Div. 900, 35 N.Y.S.2d 821, *aff'd.* 290 N.Y. 563, 47 N.E.2d 962; *Stella Flour & Feed Corp.* v. *National City Bank,* 285 App.Div. 182, 136 N.Y.S.2d 139, appeal denied 285 App.Div. 871, 137 N.Y.S. 2d 826, *aff'd.* 308 N.Y. 1023, 127 N.E.2d 864; *Gucker* v.

Town of Huntington, 254 App.Div. 10, 3 N.Y.S.2d 788; *Jones* v. *City of Binghamton,* 259 App.Div. 938, 19 N.Y.S.2d 513, appeal denied 259 App.Div. 955, 20 N.Y.S. 2d 844).

Fifth, in cases in precisely the same pre-trial procedural posture as the one at bar, this Court, both before and after its decision in *Chapman,* has considered petitions for *certiorari* from the New York State Court of Appeals on the merits and has not denied them on jurisdictional grounds (*People* v. *Garzia,* 56 A.D.2d 635, 391 N.Y.S.2d 697, *aff'd.* 44 N.Y.2d 867, 407 N.Y.S.2d 475, 378 N.E.2d 1045, *cert. den.* 439 U.S. 930, 99 S.Ct. 318, 58 L Ed. 2d 324 [1978]; *People* v. *Rivera,* 38 Misc.2d 586, 238 N.Y.S.2d 620, *aff'd.* 19 A.D.2d 863, 243 N.Y.S.2d 669, *revd.* 14 N.Y.2d 441, 252 N.Y.S.2d 458, 201 N.E.2d 32, *cert. den.* 379 U.S. 978, 85 S.Ct. 679, 13 L Ed 2d 568 [1965]; *People* v. *Cassone,* 35 Misc.2d 699, 230 N.Y.S.2d 822, *revd.* 20 A.D.2d 118, 245 N.Y.S.2d 843, *aff'd.* 14 N.Y.2d 942, 252 N.Y.S.2d 335, *cert. den.* 379 U.S. 892, 85 S.Ct. 167, 13 L Ed 2d 95 [1964]).

Finally, this petition should be reviewed on the merits at this time since it involves a significant Constitutional issue that has already resulted in differences of opinion regarding the current state of the law. (See the various opinions in the appendix to the petition as well as this Court's decision in *Walter* v. *United States,* —— U.S. ——, 48 U.S.L.W. 4807 [1980]). Such circumstances make this case particularly ripe for review at this time (*Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 at 484-85).

POINT II

The petition presents an ample basis for review by this Court.

It is difficult to imagine how respondent can, on the one hand, adopt petitioner's statement of facts in its entirety and, on the other, maintain, with an almost casual indifference, that such facts present no issue warranting review by this Court.

We submit that, in reality, respondent has only now assumed this unconcerned attitude to belie its extreme anxiety about the matter and to minimize the significance of the issues involved. The zeal with which the *prosecution* has sought to compel appellate review to this point and the obvious difficulty that several respected jurists have had with the type of constitutional issue involved herein amply demonstrates that the prosecution cannot possibly be taking this case as lightly as it now seems to be.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari is not jurisdictionally defective and should be granted.

Dated: New York, New York
October 31, 1980

Respectfully submitted,

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